IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1852 OF 2005

IN

SUMMARY SUIT NO.5960 OF 1999

M/s Rainbow Advertisers ...Plaintiffs

v/s

Dream Merchants and others ...Defendants

Mr Q.M. Ashfaq for Plaintiffs.

Mr J.P. Shah for Defendant Nos.1 and 2.

CORAM : D.K. DESHMUKH J.

DATE : 24TH NOVEMBER 2006.

P.C. :-

1. This is a notice of motion taken out by the original defendants for setting aside the ex-parte decree passed in the suit. The only ground raised for setting aside the ex-parte order is that the defendant No.2 was not served with the notice. According to him, at the relevant time, he was not in Bombay. It appears from the record that when attempts to effect personal service from Bailiff's office were made on 21st December 2004, 22nd December 2004 and 3rd January 2005 at the given address of the defendant No.2, his mother was found but the defendant No.2 was not found. Therefore, in February 2005, the writ of summons was despatched by registered post A.D. This time, the packet came back with the endorsement 'Refused'. The Officer of the Bailiff's office filed an affidavit. On the basis of that affidavit, the Court held service to be good and proceeded to pass ex-parte decree. The learned counsel appearing for defendant No.2 stated that the defendant No.2 was not in Bombay at the relevant time and that the statement made by him that he was not in Bombay has not been denied by the plaintiffs, therefore that statement should be accepted. The endorsement on the postal envelope creates presumption of valid service. That is rebuttable presumption and that the defendant No.2 at

the relevant time was not in Bombay was the fact which was in special knowledge of the defendant No.2, therefore, the burden was entirely on the defendant No.2 to establish either by documentary or oral evidence that at the relevant time, he was not in Bombay. The defendant No.2 has not led any oral or documentary evidence which will create any doubt about the authenticity of the endorsement made on the postal envelope. Therefore, no fault can be found with the ex-parte decree passed by this Court. Though there is no valid ground for setting aside the ex-parte decree, because the decree is an ex-parte decree and is a money decree, I suggested to the learned counsel appearing for defendant No.2 that in case the defendant No.2 agrees to deposit decretal amount in Court, he could be given an opportunity to contest the suit, but the learned counsel refused to accept the suggestion. It is thus clear that the defendant No.2 has no intention to make payment. The only purpose of filing this motion was just to kill time and prolong the execution of decree. Notice of motion is disposed off. The defendant No.2 is directed to pay as and by way of costs of this motion Rs.10,000/- to the plaintiffs.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.